

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

YALI SONG,)
Petitioner,) Case No.: 2:18-cv-00919-GMN-VCF
vs.)
JEANNE KENT, Director, Las Vegas Field)
Office of United States Citizenship and)
Immigration Services, in her official capacity;)
and UNITED STATES CITIZENSHIP AND)
IMMIGRATION SERVICES,)
Respondents.)
)
ORDER

Pending before the Court is the Report and Recommendation (“R&R”) of the United States Magistrate Judge Cam Ferenbach, (ECF No. 37), recommending that the Court grant Petitioner Yali Song’s (“Petitioner’s”) Motion for Attorney’s Fees and Expenses, (ECF No. 33). Respondents United States Citizenship and Immigration Services (“USCIS”) and Jeanne Kent, director of the Las Vegas USCIS field office (collectively, “Respondents”) timely filed its Objection, (ECF No. 38). Petitioner filed a Response, (ECF No. 40).

For the reasons discussed below, the Court **REJECTS** the Magistrate Judge’s R&R and **DENIES** Petitioner’s Motion for Attorney’s Fees and Expenses.

I. BACKGROUND

The case arises from USCIS's denial of Petitioner's naturalization application. (See Pet. Review, ECF No. 1). Petitioner is a native and citizen of China, and she was born on July 29, 1986. (*Id.* ¶ 6). On November 18, 2006, Petitioner and her mother entered the United States as

1 K-1 and K-2 nonimmigrants.¹ (*Id.* ¶ 7). Petitioner was twenty (20) years old at the time of
 2 entry. (*Id.*).

3 Petitioner's mother married within ninety (90) days of entering the United States. (*Id.*
 4 ¶ 8). On March 19, 2007, Petitioner and her mother filed separate Form I-485² for the purpose
 5 of adjusting their immigration status and registering for permanent residence in the United
 6 States. (*Id.* ¶ 9). USCIS granted Petitioner's mother's request; however, denied Petitioner's
 7 application because Petitioner turned twenty-one (21) years old before USCIS adjudicated her
 8 Form I-485. Petitioner, however, was twenty (20) years old at the time of entry and at the time
 9 she submitted her Form I-485. (*Id.* ¶ 9).

10 In 2009, Petitioner married a United States citizen. Based on her marriage, Petitioner
 11 filed a second Form I-485 to register for permanent residence after marrying a United States
 12 citizen. (*Id.* ¶ 10). USCIS subsequently approved Petitioner's second Form I-485 based on her
 13 marriage and Petitioner received lawful permanent resident status on December 1, 2009. (*Id.*).

14 Approximately eight (8) years after receiving permanent resident status, Petitioner filed
 15 an Application for Naturalization ("Form N-400"). (*Id.* ¶ 11). After further review of
 16 Petitioner's immigration record, USCIS found that it had, unfortunately, granted Petitioner's
 17 permanent status in 2009 by mistake.³ (*Id.* ¶ 12); (Decision Denying Form N-400 at 37, Ex. I to
 18 Pet. Review, ECF No. 2). USCIS consequently denied Petitioner's naturalization application

20 ¹ As the Government explains in its Motion to Dismiss, K-1 nonimmigrant status refers to an "alien" who is the
 21 fiancé of a United States citizen and seeking to enter the United States to get married within ninety days. (Mot.
 22 Dismiss ("MTD") 2:22–24); 8 U.S.C. § 1101(a)(15)(K)(i). Similarly, K-2 nonimmigrant status refers to a minor
 23 child of a K-1 nonimmigrant who is accompanying or following their parent to the United States. (*Id.* 2:23–26);
 24 8 U.S.C. § 1101(a)(15)(K)(iii).

25 ² A Form I-485, "Application to Register Permanent Residence or Adjust Status," is an application to adjust status
 26 pursuant to 8 U.S.C. § 1186a. (Resp't's Mot. Dismiss at 3 n.1, ECF No. 11).

³ Petitioner's K-2 status allowed an adjustment to permanent status only on the basis of her mother's marriage to
 27 a United States citizen, yet the 2009 adjustment erroneously occurred on the basis of Petitioner's own marriage.
 28 See 8 U.S.C. § 1255(a)–(d); (MTD 5:1–14, ECF No. 11); (Pet. ¶ 10).

1 on April 19, 2017 because Petitioner had not properly received lawful permanent residency in
 2 the United States. (*Id.* ¶ 12).

3 On May 25, 2017, Petitioner filed a Request for Hearing on Decision in Naturalization
 4 Proceedings. (*Id.* ¶ 13). In that Request, Petitioner’s counsel conceded that USCIS mistakenly
 5 granted her 2009 application for permanent residence. (Mem. Support Request for Hearing at
 6 56, Ex. L to Pet. Review, ECF No. 2). Nevertheless, Petitioner explained that a 2011 decision
 7 by the Board of Immigration Appeals (“BIA”) in *Matter of Le* had essentially invalidated
 8 USCIS’s basis for denial of Petitioner’s 2007 application for permanent resident status. (*Id.* at
 9 56–60).

10 Specifically, Petitioner pointed out that *Matter of Le* abrogated USCIS’s prior finding
 11 that Petitioner “aged out” of eligibility for permanent residency under her K-2 nonimmigrant
 12 status. (*Id.*). Petitioner thus argued that USCIS could approve her 2007 application *nunc pro*
 13 *tunc* by retroactively applying this new authority to remedy the “procedural hiccup” that
 14 prevented her naturalization. (*Id.*). USCIS, however, denied Petitioner’s request for *nunc pro*
 15 *tunc* relief and retroactive application of authority in its Decision on March 7, 2018. (Decision
 16 Denying Form N-336 at 64–65, Ex. M. to Pet. Review, ECF No. 2); (Pet. ¶ 14).

17 Pursuant to 8 U.S.C. § 1421(c), Petitioner filed a Petition for Judicial Review in this
 18 Court on May 20, 2018, seeking *de novo* review of USCIS’s denial of naturalization. (*Id.* at 3).
 19 The Court ultimately granted judgment in favor of Petitioner, finding that USCIS erroneously
 20 denied Petitioner’s request for *nunc pro tunc* relief. (*See* Order Granting Mot. Summ. J., ECF
 21 No. 31). Petitioner thereafter filed a Motion for Attorney’s Fees under the Equal Access to
 22 Justice Act (“EAJA”). (*See* Mot. Att’y Fees, ECF No. 33). Magistrate Judge Cam Ferenbach
 23 issued a Report and Recommendation, (ECF No. 37), recommending the Court grant the
 24 Motion for Attorney’s Fees and award Petitioner \$18,077.50 in attorney’s fees and costs.
 25

1 Respondents filed an Objection, (ECF No. 37), to which Petitioner filed a Response, (ECF No.
2 40).

3 **II. LEGAL STANDARD**

4 A party may file specific written objections to the findings and recommendations of a
5 United States Magistrate Judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);
6 D. Nev. R. IB 3-2. Upon the filing of such objections, the Court must make a *de novo*
7 determination of those portions of the Report and Recommendation to which objections are
8 made. *Id.* The Court may accept, reject, or modify, in whole or in part, the findings or
9 recommendations made by the Magistrate Judge. 28 U.S.C. § 636(b)(1); D. Nev. IB 3-2(b).

10 **III. DISCUSSION**

11 Respondents make two objections. First, they argue that the award of fees under the
12 EAJA is unwarranted given that USCIS's denial of Petitioner's naturalization application was
13 substantially justified. (Resp't's Objection ("Obj.") 7:6–8:12, ECF No. 38). Respondents
14 specifically argue that the R&R failed to discuss or even address the fact that applying *Matter*
15 *of Le* retroactively or *nunc pro tunc* was an issue of first impression. (*Id.* 7:14–24). In the
16 alternative, Respondents request the Court reduce the amount of attorney's fees sought to the
17 "reasonable time spent" because the R&R failed to make a specific reasonableness finding as to
18 the fees and hours counsel spent in the underlying case. (*Id.*).

19 Under 28 U.S.C. § 2412(d)(1)(A) of the EAJA:

20 eligibility for a fee award in any civil action requires: (1) that the claimant be "a
21 prevailing party"; (2) that the Government's position was not "substantially
22 justified"; (3) that no "special circumstances make an award unjust"; and, (4)
23 pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the
court within 30 days of final judgment in the action and be supported by an
itemized statement.

24 *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1167 (9th Cir. 2019) (quoting *I.N.S.*
25 *Comm'r v. Jean*, 496 U.S. 154, 158 (1990)), cert. denied, 140 S. Ct. 424 (2019). "The clearly

1 stated objective of the EAJA is to eliminate financial disincentives for those who would defend
 2 against unjustified governmental action and thereby to deter the unreasonable exercise of
 3 Government authority.” *Ardestani v. I.N.S.*, 502 U.S. 129, 138 (1991). “Congress specifically
 4 intended the EAJA to deter unreasonable agency conduct.” *Ibrahim*, 912 F.3d 1147, 1166–67
 5 (9th Cir. 2019) (citing *Jean*, 496 U.S. at 163 n.11 (quoting the statement of purpose for the
 6 EAJA, Pub. L. No. 96-481, §§ 201–08, 94 Stat. 2321, 2325–30 (1980)). “The policy behind the
 7 EAJA ‘is to encourage litigants to vindicate their rights where any level of the adjudicating
 8 agency has made some error in law or fact and has thereby forced the litigant to seek relief
 9 from a federal court.’” *Id.* at 1167 (quoting *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007)).

10 **A. Substantial Justification**

11 Respondents oppose Petitioner’s eligibility for an EAJA fee award on two grounds,
 12 arguing that Respondents’ position before and during litigation was substantially justified.
 13 (Resp’t’s Resp. to Mot. Atty’s Fees (“Resp.”) 3:1–7:11, ECF No. 35).⁴ “When evaluating the
 14 government’s ‘position’ under the EAJA,” federal courts “consider both the government’s
 15 litigation position and the ‘action or failure to act by the agency upon which the civil action is
 16 based.’” *Ibrahim*, 912 F.3d at 1168 (quoting 28 U.S.C. § 2412(d)(1)(B)). “Thus, the substantial
 17 justification test is comprised of two inquiries, one directed toward the government’s agency’s
 18 conduct, and the other toward the government’s attorneys’ conduct during litigation. *Id.* (citing
 19 *Gutierrez v. Barnhart*, 274 F.3d 1255, 1259 (9th Cir. 2001)).

20 Respondents bear the burden of showing that their position was substantially justified.
 21 *Gonzalez v. Free Speech Coalition*, 408 F.3d 613, 618 (9th Cir. 2005). To prove substantial
 22 justification, “the government need not establish that it was correct or ‘justified to a high
 23 degree.’” *Ibrahim*, 912 F.3d at 1167 (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

24
 25 ⁴ Petitioner asserts that Petitioner is the “prevailing party” in this suit. (Mot. Att’y Fees 3:4–10). The Court
 agrees given that the Court granted summary judgment in favor of Petitioner. (See Order Granting Mot. Summ.
 J., ECF No. 31).

1 Respondents must only establish that their “position is one that ‘a reasonable person could
2 think it correct, that is, [that the position] has a reasonable basis in law and fact.’” *Id.* (quoting
3 *Pierce*, 487 U.S. at 566 n.2). The fact that Respondents did not prevail in court “does not raise
4 a presumption that [their] position was not substantially justified.” *Kali v. Bowen*, 854 F.2d
5 329, 334.

i. USCIS's Conduct Prior to Litigation

7 Respondents argue that “USCIS’s determination was substantially justified because it
8 applied the then-existing law to Petitioner’s first I-485 application and later declined to approve
9 Petitioner’s naturalization application based on Petitioner’s inability to establish a statutorily
10 mandated requirement.” (Obj. 8:8–11). In response, Petitioner asserts that USCIS’s mistake in
11 granting Petitioner’s 2009 adjustment application and USCIS’s subsequent refusal to remedy
12 the mistake by retroactively applying *Matter of Le* was nonetheless unreasonable. (Mot. Att’y
13 Fees 4:1–9).

The position of the United States is defined as “the action or failure to act by the agency upon which the civil action is based.” See 28 U.S.C. § 2412(d)(2)(D). The parties do not define USCIS’s specific actions in the underlying administrative proceeding. In *Thangaraja v. Gonzales*, the Ninth Circuit determined that position of the United States as “DHS’s litigation position and the underlying agency decision rendered by the BIA or an IJ.” *Thangaraja*, 428 F.3d 870, 874 (9th Cir. 2005). Similarly, in the context of social security disability benefits, the Ninth Circuit held that “we have consistently treated the ALJ’s decision as the ‘action or failure to act by the agency upon which the civil action is based.’” *Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013). Here, Petitioner bases her civil action upon two main actions by USCIS: (1) its denial of her naturalization application; and (2) its decision reaffirming the decision to deny the naturalization application. (Pet. Review ¶¶ 12, 14). The relevant inquiry, therefore, is whether

1 USCIS was substantially justified in denying Petitioner's naturalization application and
 2 reaffirming its denial.

3 1. Denial of Naturalization Application

4 As to USCIS's decision to deny Petitioner's naturalization application, the Court finds
 5 that its denial was substantially justified. *Ibrahim*, 912 F.3d at 1167. In its Decision denying
 6 Petitioner's application for naturalization, USCIS determined that Petitioner was "statutorily
 7 ineligible to adjust status on December 1, 2009, and therefore not lawfully admitted." In
 8 making this determination, USCIS explained:

9 A K-2 nonimmigrant . . . may not adjust status except as a result of the marriage
 10 (or, in the case of a minor child, the parent's marriage) to the citizen who filed the
 petition to accord that alien's non-immigrant status. See INA 245(d).

11 Accordingly, you were only eligible to adjust status based on your mother's
 marriage to the U.S. citizen petitioner.

12 Despite your ineligibility to adjust status under INA 245, USCIS approved your
 13 Form I-485 in error on December 1, 2009, and you were issued a permanent
 14 resident card bearing immigrant classification CR6.

15 On June 23, 2011, the Board of Immigration Appeals issued its decision, (Matter
 16 of Le, 25 I&N Dec. 541 (BIA 2011)) . . . Unfortunately, you could no longer be
 17 classified as a 'derivative child' because you were married at the time of this
 decision.

18 (Decision Denying Form N-400 at 2, Ex. I to Administrative Record, ECF No. 2). Despite
 19 USCIS's erroneous approval of Petitioner's second adjustment application in 2009,⁵ Petitioner
 20 was not otherwise eligible to adjust her status in 2009 because she was no longer considered a
 21 "derivative child." *See* 8 U.S.C. § 1101(b)(1) (defining a child under the Immigration and
 22 Nationality Act as "an unmarried person under twenty-one years of age"). Because Petitioner
 23 was married at the time of the decision, Petitioner, therefore, was unable to lawfully adjust her

24
 25⁵ Respondents concede that USCIS "should not have approved [Petitioner's] second I-485 application." (Resp.
 3:26–27).

1 status under a K-2 visa in 2009. *See id.* Without this adjustment, Petitioner was unable to
 2 demonstrate lawful admission for permanent residence—a statutory bar to her naturalization.
 3 USCIS was, therefore, substantially justified in denying Petitioner’s naturalization application
 4 given that Petitioner could not establish the statutory requirement for lawful permanent
 5 residency pursuant to 8 U.S.C. § 1255(d).

6 2. Rehearing on Denial of Naturalization

7 Respondents argue that applying *nunc pro tunc* relief to an application collateral to
 8 naturalization proceedings was not established legal precedent. (Resp. 4:22–5:3). Specifically,
 9 Respondents contend that no authority authorized USCIS to go beyond the provisions of 8
 10 U.S.C. § 1429 to retroactively apply *Matter of Le*. (*Id.* 5:1–2). In response, Petitioner argues
 11 that “USCIS’s refusal to consider . . . *nunc pro tunc* relief was patently unreasonable in light of
 12 the fact that *nunc pro tunc* relief has ‘a long and distinguished history in the field of
 13 immigration law.’” (Mot. Att’y Fees 4:10–12). To prove substantial justification, “the
 14 government need not establish that it was correct or ‘justified to a high degree.’” *Ibrahim*, 912
 15 F.3d at 1167 (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Rather, Respondents
 16 must demonstrate that “a reasonable person could think it correct” that USCIS declined to grant
 17 *nunc pro tunc* relief in the underlying administrative proceeding.

18 Weighing the arguments, the Court concludes that Respondents have met their burden in
 19 showing that USCIS’s reaffirmation of denial was substantially justified. In reevaluating its
 20 denial of Petitioner’s naturalization application, USCIS declined to apply *Matter of Le*
 21 retroactively because no case law supported retroactive application of the decision.
 22 Specifically, USCIS determined:

23 Your legal counsel agrees that this 2009 adjustment of status was in error and
 24 asserts that the remedy is to retroactively (nun pro tunc) apply *Matter of Le* to the
 25 2007 decision. However, *Matter of Le* was decided in 2011 and does not apply
 retroactively (or nunc pro tunc) to your case. During the N-366 hearing, counsel

1 was asked if he could cite to any case law to support a retroactive application of
 2 Le, but he could not provide supporting case law.

3 (Decision Denying Form N-366, Ex. M to Administrative Record, ECF No. 2). Though USCIS
 4 ultimately determined that *nunc pro tunc* relief was not warranted in Petitioner's case, USCIS
 5 considered retroactively applying *Matter of Le*. *Id.* Indeed, USCIS requested provide specific
 6 authority to support a retroactive application of *Matter of Le*. Counsel's inability to provide
 7 supporting case law, however, illustrates the lack of authority and precedent regarding
 8 retroactive application to this specific case. *See Poole v. Rourke*, 779 F. Supp. 1546, 1563 (E.D.
 9 Cal. 1991) (noting "lack of clarity in the substantive law" as a factor that supports a substantial
 10 justification finding). Though the Court ultimately found that USCIS could have applied
 11 *Matter of Le* retroactively, USCIS's refusal to grant *nunc pro tunc* relief was grounded in
 12 reasonable law and fact. *See Ibrahim*, 912 F.3d at 1167 (quoting *Pierce v. Underwood*, 487
 13 U.S. 552, 565 (1988)) ("[T]he government need not establish that it was correct or 'justified to
 14 a high degree.'"); *see also Vargas v. Wolf*, No. 2:19-cv-02135-KJD-DJA, 2021 U.S. Dist.
 15 LEXIS 50624, at *4 (D. Nev. Feb. 10, 2021) ("While Respondents may have been unsuccessful
 16 in their arguments, they were justified in pursuing them."). The Court accordingly finds that
 17 USCIS was substantially justified in refusing to retroactively apply *Matter of Le* during the
 18 administrative proceedings.⁶ The Court now analyzes whether USCIS was substantially
 19 justified in its actions during litigation.

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21 //

23 ⁶ Petitioner further argues, in its Reply, that USCIS failed to explain exactly why the authorities cited by
 24 Petitioner in its Memorandum for Rehearing were inapplicable. (Reply 4:10–11). "It is improper for a moving
 25 party to introduce new facts or different legal arguments in the reply brief than those presented in the moving
 papers." *United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000); *see also Lujan v. National Wildlife Federation*, 497 U.S. 871, 894–95, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990).
 Accordingly, the Court declines to address Petitioner's additional argument.

ii. USCIS's Conduct During Litigation

2 Respondents argue that the United States' position during litigation was likewise
3 substantially justified in law and fact given that the case involved novel issues, including: (1) a
4 district court's scope of review under 8 U.S.C. § 1421(c); (2) the retroactive application of a
5 BIA decision in *Matter of Le* to the USCIS's first denial of Petitioner's application for
6 permanent resident status; and (3) the correction *nunc pro tunc* to the USCIS's mistaken denial
7 of permanent resident status to Petitioner's first application for permanent resident status.
8 (Resp. 5:6–11). Though this case may have presented novel issues, Petitioner contends that an
9 issue of first impression does not constitute a sufficient reason to deny EAJA fees. (Resp. to
10 Obj. 3:8–16, ECF No. 40).

“Fees may be denied when the litigation involves questions of first impression, but whether an issue is one of first impression is but one factor to be considered.”” *Ibrahim*, 912 F.3d at 1169 (citing *United States v. Marolf*, 277 F.3d 1156, 1162 n.2 (9th Cir. 2002)). “There is no per se rule that EAJA fees cannot be awarded where the government’s litigation position contains an issue of first impression.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1261 (9th Cir. 2001). However, “[i]n several cases, [the Ninth Circuit has] held that the government’s litigation position was substantially justified when the rules under which it was operating were ambiguous and it pursued a reasonable interpretation on which we had not previously ruled.” *Id.*

20 In *Rawlings v. Heckler*, the Ninth Circuit held that the government was substantially
21 justified in litigating issues that were unsettled in the Circuit. *Rawlings*, 725 F.2d 1192, 1196
22 (9th Cir. 1984). There, the government appealed a district court’s award of attorney’s fees
23 under the EAJA. *Id.* The Ninth Circuit ultimately determined that “the government’s appeal to
24 this court was reasonable both on the question of the retroactive effect of the EAJA and the
25 proper definition of the term ‘position of the United States.’” *Id.*

1 Likewise, Respondents reasonably litigated novel issues of law concerning the
2 retroactive effect of *Matter of Le*. Neither the Ninth Circuit nor the BIA analyzed the
3 retroactive effect of *Matter of Le* prior to the underlying action. The retroactive application of
4 *Matter of Le* was, therefore, not a clear-cut rule under statutory immigration law. *See Gutierrez*
5 *v. Barnhart*, 274 F.3d 1255, 1262 (9th Cir. 2001) (finding that “the only issue of first
6 impression [the Ninth Circuit was] required to resolve was the impact of a failure to follow a
7 clear rule contained in the SSA’s regulations.”). Indeed, in its Brief attached to its Petition for
8 Review, Petitioner does not provide existing precedent to support retroactive application but
9 instead argues that *Matter of Le*, as a new rule adopted in the course of agency adjudication,
10 should be applied retroactively under the factors established in *Retail, Wholesale & Dep’t Store*
11 *Union v. NLRB*, 151 U.S. App. D.C. 209, 466 F.2d 380 (1972). Given the ambiguous law on
12 granting *nunc pro tunc* relief in *Matter of Le*, Respondents were substantially justified in
13 litigating the underlying case.

14 Petitioner additionally argues that Respondents’ litigation position was not substantially
15 justified because they “obfuscated the second and third *Retail* factors, . . . and completely
16 ignored the fifth *Retail* factor” in Respondents’ Response and Cross-Motion. (Mot. Att’y Fees
17 5:20–6:1). In deciding whether the government’s litigation position is substantially justified,
18 “the EAJA . . . favors treating a case as an inclusive whole, rather than as atomized line items.”
19 *United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996), quoting *Comm’r, INS*, 496 U.S. 154,
20 161–62, 110 L. Ed. 2d 134, 110 S. Ct. 2316 (1990). As a whole, Respondents’ decision to
21 defend USCIS’s denial and reaffirmation of its denial was substantially justified given the
22 ambiguity in law and lack of precedent regarding the retroactive application of *Matter of Le*. A
23 reasonable person could, therefore, find that litigating the underlying action was based in
24 reasonable law and fact. Accordingly, because the Court finds that Respondents were
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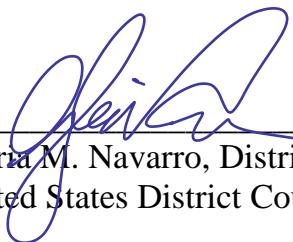
1 substantially justified in defending itself in the underlying action, the Court finds that EAJA
2 fees and expenses are not warranted.

3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that the Report and Recommendation, (ECF No. 37) is
5 **REJECTED**.

6 **IT IS FURTHER ORDERED** that the Motion for Attorney's Fees, (ECF No. 33), is
7 **DENIED**.

8 **DATED** this 31 day of March, 2021.

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12 Gloria M. Navarro, District Judge
13 United States District Court
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